IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

WRIT PETITION NO.5276 OF 2007

Sushila Khimji Rambhia : Petitioner

V/s.

Alpesh Kishorchand Ajmera : Respondent

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Mr.V.A.Thorat, Senior Advocate, with Ms Rekha Shinde and Ms Yogini Gada i/b. M/s.Harakhchand & Co., for the petitioner.

Mr.Sanjay Jain with Ms Laxmi G. Senani i/b. Mr.A.V.Jain for the respondent.

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CORAM : S.A.BOBDE, J.

DATE : JULY 19, 2007.

P.C.

1. Rule, returnable forthwith.

Mr.Sanjay Jain waives service for the respondent.

Heard by consent.

2. The petitioner-plaintiff has challenged the order dated 30.3.2007 of the Court of Small Causes at Mumbai rejecting her application for amendment. The petitioner has sued the respondent in the year 2005, inter alia, for a declaration that she is a lawful tenant in respect of

the suit premises. Issues were framed in the suit on 30.6.2006. In February 2007, the petitioner proposed the amendment in question and sought to introduce a paragraph that pending the suit, the respondent has illegally and high-handedly demolished the suit premises and sought a mandatory order. This application for amendment has been rejected. The learned Judge while rejecting the application observed that the petitioner has not shown due diligence as contemplated under the proviso to Rule 17 of Order VI and moved the application for amendment after the commencement of the trial and that the proposed amendment changed the entire nature of the suit.

3. Mr.Thorat, the learned counsel for the petitioner, submitted that the amendment has been rejected contrary to the well-settled principle of grant and denial of amendment as laid down by the Supreme Court. The learned counsel relied on the judgment of the Supreme Court in Rajesh Kumar Aggarwal v. K.K.Modi (AIR 2006 S.C. 1647) and in Baldev Singh v. Manohar Singh (AIR 2006 SC 2832).

4. Mr.Jain, the learned counsel for the respondent, on the other hand, submitted that the application for amendment has been moved on the basis of statements which are not correct and have not been moved with diligence and, therefore, has been rightly rejected.

5. Order VI Rule 17 reads as under:-

> "17. Amendment of pleadings.--The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:
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> Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

It is obvious from Order VI Rule 17 that an amendment may be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.

6. The trial in this case can be said to have commenced

on 30.6.2006 i.e. the date of framing of the issues. The proviso to Rule 17 provides that amendment application shall not be allowed after the commencement of the trial, unless the party applying for amendment shows that the matter could not have been raised before the commencement of trial. Having regard to the nature of the proposed amendment that the respondent demolished the suit premises in July 2006 i.e. after commencement of the trial, it is clear that the petitioner could not have raised the matter before the commencement of the trial. The requirement of the proviso is that the party applying for amendment must have due diligence and must demonstrate that the matter could not have been raised before the commencement of the trial.

7. In Rajesh Kumar Aggarwal's case (supra), the Supreme Court made the following observations:-

> "14. We have carefully gone through the relevant pleadings, annexures and the judgment rendered by the learned single Judge and of the learned Judges of the Division Bench of the High Court.
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> Order 6, Rule 17 of the CPC reads thus:
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> .....

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15. This rule declares that the Court may, at any stage of the proceedings, allow either party to alter or amend his pleadings in such a manner and on such terms as may be just. It also states that such amendments should be necessary for the purpose of determining the real question in controversy between the parties. The provision enacts that no application for amendment should be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the part (sic) could not have raised the matter for which amendment is sought before the commencement of the trial.

16. The object of the rule is that Courts should try the merits of the case that come before them and should, consequently allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to

the other side.

> 17. Order VI, Rule 17 consist of two parts whereas the first part is discretionary (may) and leaves it to the Court to order amendment of pleading. The second part is imperative (shall) and enjoins the Court to allow all amendments which are necessary for the purpose of determining the real question in controversy between the parties."

Having regard to these observations, in my view, the petitioner was entitled to have her application for amendment allowed since according to the plaintiff, the demolition has been carried out after the commencement of the trial.

8. Mr.Jain, the learned counsel for the respondent, relied on the decision of the Supreme Court in Ajendraprasadji N. Pande and Anr. v. Swami Keshavprakeshdasji N. and Ors. (AIR 2007 SC 806), the Supreme Court observed in para 34 that the party must satisfy the requirement of law that the matters now sought to be introduced by the amendment could not have been raised earlier in spite of due diligence and that

the trial is deemed to commence when the issues are settled and the case is set down for recording of evidence. I do not see how these observations come in the way of allowing the amendment in the present case. The issues were framed on 30.6.2006 and the amendment sought in respect of an incident which is alleged to have occurred thereafter i.e. sometime in July 2006.

9. In this view of the matter, the amendment is necessary for determining the real controversy between the parties. Indeed, if the amendment is not allowed, it would engender a multiplicity of proceedings. The amendment deserves to be allowed and is hereby allowed. The rule is made absolute in the above terms. The amendment be carried out within four weeks before the trial Court.

10. The learned counsel for the respondent makes an application for stay of this order. There is no sufficient reason for staying this order. The prayer for stay is rejected.

S.A. BOBDE, J.